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No. 07-275

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

SUSAN BALDWIN,

Petitioner,

v.

BLUE CROSS/BLUE SHIELD OF ALABAMA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

PEYTON LACY, JR., ESQ.
Counsel of Record
JOHN RICHARD CARRIGAN, ESQ.
OGLETREE, DEAKINS, NASH, SMOAK AND STEWART, P.C.
1819 Fifth Avenue North, Ste. 1000
Birmingham, AL 35203
Ph. (205) 328-1900; Fax (205) 328-6000
Counsel for Respondent

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Petitioner states the following issues as being presented and worthy of review by the Court. Respondent contends that these issues misstate the holding of the Eleventh Circuit Court of Appeals and that there are no issues which could be properly phrased to justify this Court's review of the decision below.

Whether summary judgment, interpreting all reasonable inferences to the non-moving party, was properly granted which includes the following questions:

1. Whether there was actionable sexual harassment where in addition to the sexual harassment directed at the sole woman, the harasser also allegedly made disparaging remarks to the eight other men employed.

2. Whether the employer satisfies the *Ellerth/Faragher* affirmative defense, *i.e.*, "(1) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities [it] provided," *Burlington Industries v. Ellerth,* 524 U.S. 742, 765, 118 S. Ct. 2257, 2270 (1998); *Faragher v. City of Boca Raton,* 524 U.S. 775, 807, 118 S. Ct. 2275, 2293 (1998), by offering the victim the following options: psychological counseling with the alleged harasser, a transfer to a completely new city for a largely commission-based sales job, or termination if she does not resign.

QUESTIONS PRESENTED – Continued

3. Whether the Eleventh Circuit erred in determining, contrary to the time period permitted in the Fifth Circuit, that by waiting just over three months to file an internal complaint of sexual harassment (and 38 days after being instructed by her manager – "Don't you ever fucking go over my head. You'll fucking lose your job . . . ") Baldwin was "unreasonable" as a matter of law and thus failed to take advantage of any preventative or corrective opportunities.

PARTIES TO THE PROCEEDING

Pursuant to S. Ct. Rule 14.1(b) the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Eleventh Circuit:

The Petitioner here and the appellant below is Susan Baldwin.

The Respondent here and the appellee below is Blue Cross and Blue Shield of Alabama.

CORPORATE DISCLOSURE STATEMENT (RULE 29.6)

Pursuant to Supreme Court Rule 29.6, Respondent, Blue Cross and Blue Shield of Alabama states that it is an Alabama not-for-profit corporation that issues no securities to the public, and is not owned by any parent or publicly held corporation.

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BRIEF IN OPPOSITION

The Petition should be denied because the decision of the Eleventh Circuit followed the relevant precedential decisions of this Court, and the Petition raises no important undecided issue of federal law or any conflicting decisions from United States courts of appeals warranting this Court's review.

The Eleventh Circuit correctly stated and properly applied the affirmative defense recognized by this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) ("the *Ellerth/Faragher* defense"). The arguments advanced in the Petition are founded in Petitioner's misinterpretation of the decision of the Eleventh Circuit in this case. The Petition implies that the court's holding creates a time-barred "mandatory summary judgment" standard in the Eleventh Circuit which results in a conflict among United States courts of appeals. No such conflict is disclosed in the cases cited by Petitioner and no such conflict in fact exists.

The Eleventh Circuit did not direct "mandatory summary judgment" in cases where the plaintiff delays a report of sexual harassment under an appropriate policy against such activity more than three months. Instead, accepting the Petitioner's allegations as true in this case, the Eleventh Circuit

held the Petitioner's delay, under all the circumstances, in reporting her stated concern over alleged sexual harassment, vulgar language and rude behavior in the Respondent's Huntsville, Alabama office, failed to satisfy her obligation to act reasonably in reporting what she considered to be sexual harassment promptly under a policy of which Petitioner was admittedly aware under the undisputed facts of this case.

The Eleventh Circuit also held that Petitioner refused to take advantage of the reasonable corrective measures that Respondent offered her, and that this refusal established the second element of the *Ellerth/Faragher* defense.

STATEMENT OF THE CASE

Respondent adopts for purposes of this Petition the statement of facts in the district court's Memorandum Opinion (pp. 41a to 59a of App. C to the Petition) and the Eleventh Circuit's recitation of the facts construed in the light most favorable to Petitioner (*see*, pp. 4a-19a of App. B to the Petition).

The "Factual Background" recounted in the Petition departs somewhat from Petitioner's previous factual contentions, most importantly by disregarding Petitioner's unequivocal refusal to agree to continue to work for Scott Head, her direct supervisor and the district manager of Respondent's Huntsville office. After Petitioner's November 8, 2001, report of the

alleged events of harassment which occurred in July and August of that year, she continued to work during the investigation by Blue Cross. When Petitioner was advised that the results of the investigation did not corroborate her complaints and that Scott Head would not be fired as she requested, Petitioner insisted that she would not work for Scott Head on at least three occasions and admitted these refusals in her deposition.

After Petitioner insisted that she would not work for Scott Head, Respondent offered the remedial alternative of continuing to work under the supervision of her manager in Huntsville, under the scrutiny of an industrial psychologist[1] that Respondent had successfully used to monitor such situations previously (App. B, pp. 35a-36a). Respondent also offered the remedial alternative of a transfer to a similar sales job in Birmingham, a city where Petitioner had worked in 9 of her 12 years of employment with the Respondent.[2] After Petitioner rejected those

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[1] The Petition inaccurately describes the proposal that an industrial psychologist would monitor the work relationship between Petitioner and Scott Head as "'couples' therapy" (Petition, p. 5). Respondent's Senior Vice President and Compliance Officer "proposed . . . to enlist the assistance of an expert to counsel them and monitor their interactions in order to prevent any future problems. The person he had in mind was an industrial psychologist, . . . whom the company had used successfully in similar cases in the past." (*See*, App. B, p. 18a).

[2] Petitioner's description of Birmingham as a "completely new city" is inaccurate. Petitioner worked for Respondent in Birmingham from her hiring in August 1989 until she became a

(Continued on following page)

alternatives and repeated her refusal to work for Scott Head, Respondent suspended Petitioner. Petitioner never recanted her adamant refusal to continue to work for Scott Head, and after further refusals to accept either alternative, Respondent terminated Petitioner's employment based on this conduct. (*See,* App. C, pp. 53a-58a; App. B, pp. 17a-19a).

The Eleventh Circuit noted and rejected Petitioner's argument that Respondent should have disbelieved that Petitioner in fact refused to work for Scott Head (*see,* App. B, p. 36a). Petitioner states in her deposition that she told Respondent that she was unwilling to continue to work for Mr. Head. (App. C, pp. 68a-70a).

As the district court and the Eleventh Circuit agreed:

> "there is no genuine issue of fact about the reason Baldwin lost her job, and the reason is exactly what the district court said: Baldwin refused to cooperate in the company's reasonable attempt to solve the problem."

(*see,* App. B, pp. 35a-36a; *see also,* App. C, pp. 68a-71a).

Marketing Representative in the Huntsville office in April 1998. (App. C, p. 41a).

COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE BELOW

Petitioner's Complaint, filed September 24, 2003, alleged sex discrimination based on a hostile work environment and retaliation. She also alleged invasion of privacy, intentional infliction of emotional distress, and negligent retention, supervision, and training. On September 13, 2005, the district court granted Respondent's motion for summary judgment on all claims.

The Eleventh Circuit affirmed summary judgment on all claims on March 19, 2007, and is reported at *Baldwin v. Blue Cross/Blue Shield of Alabama,* 480 F.3d 1287 (11th Cir. 2007) and is reprinted as Appendix B to the Petition (App. B). Petitions for rehearing and for rehearing *en banc* were denied on May 30, 2007 (App. A).

REASONS FOR DENYING THE WRIT

The Petition should be denied, because the decision of the Eleventh Circuit correctly applied pertinent decisions of this Court. The "Questions Presented" by the Petition misconstrue the decision below, asserting holdings not made by the Eleventh Circuit Court of Appeals in its opinion to imply a conflict among circuits that does not exist.

Argument on First "Question Presented"

Petitioner's first "Question Presented,"[3] addressed in argument at pp. 7-10 of the Petition under the heading "I. CONTEXT STILL MATTERS," challenges the Eleventh Circuit's discussion of the "equal opportunity curser" principle arguably applicable to vulgar language that was heard by Petitioner as well as by male employees. However, Petitioner's first "Question Presented" is not actually presented by the decision below, because the Eleventh Circuit explicitly declined to answer (App. B, p. 25a):

> . . . whether the sexually harassing conduct that Baldwin did experience during the thirteen months she worked under Head's supervision was "sufficiently severe or pervasive to alter the terms and conditions of [her] employment." [citing *Gupta v. Fla. Bd. of Regents,* 212 F.3d 571, 582 (11th Cir. 2000)].

The case was decided based on Respondent's proof of the *Ellerth/Faragher* defense, discussed below, and this Petition is not an appropriate vehicle to examine a purported conflict among circuits on an "equal opportunity curser" issue.

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[3] "1. Whether there was actionable sexual harassment where in addition to the sexual harassment directed at the sole woman, the harasser also allegedly made disparaging remarks to the eight other men employed." (Petition, p. i).

Argument on Second "Question Presented"

Petitioner's second "Question Presented,"[4] addressed in argument at pp. 10-11 of the Petition as "II. TANGIBLE JOB ACTION PRESENT" misconstrues the decision of the Eleventh Circuit, and misstates the actions of Petitioner and Respondent by omitting any reference to Petitioner's repeated refusal to continue to work for Scott Head.

The Petition at p. 10 mentions a "stark choice" of alternatives presented to Petitioner "after reporting harassment," but totally omits reference to the full factual context in which those alternatives were presented.

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[4] Stated as follows:

> 2. Whether the employer satisfies the *Ellerth/Faragher* affirmative defense, i.e., "(1) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities [it] provided," *Burlington Industries v. Ellerth*, 524 U.S. 742, 765, 118 S. Ct. 2257, 2270 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S. Ct. 2275, 2293 (1998), by offering the victim the following options: psychological counseling with the alleged harasser, a transfer to a completely new city for a largely commissioned based sales job, or termination if she does not resign." (Petition, p. i).

The Eleventh Circuit carefully and accurately assessed Petitioner's claims that she suffered tangible adverse employment action discrimination by Blue Cross, the first of which was Respondent's offer to transfer her to the Birmingham office in order to resolve the problems she and Head were having, and the second of which was her termination (App. B, pp. 20a-21a).

The Eleventh Circuit held in this case that the *offer* of a transfer is not a tangible job action:

> An offer to transfer an employee, however, is not an adverse employment action. It is merely an offer. Providing an employee with a choice about where she works does not change the terms or conditions of her employment.

(App. B, pp. 20a-21a).

Petitioner argues that "whether a transfer is an adverse employment action is a jury question" citing *Keeton v. Flying J*, 429 F.3d 259 (6th Cir. 2005), *rehearing and rehearing en banc denied* (2006), *cert. denied*, ___ U.S. ___, 127 S. Ct. 109, 166 L. Ed. 2d 33 (2006). *Keeton* involved the firing of the plaintiff, rehiring the same day, and an immediate involuntary transfer to a different facility, circumstances materially different from those of Petitioner. There was clearly an involuntary transfer at issue in *Keeton*, not the offer of a voluntary transfer to another supervisor's group as a remedy for alleged harassment by the

current supervisor in response to a stated refusal to work for the alleged harasser.

There is, again, no conflict with the decision of another circuit. Immediate involuntary transfer of an employee may be a tangible adverse job action under the facts in *Keeton*; but offering the alternative of transfer to an employee who has indicated she will not remain in her current work location under her current supervision does not present a tangible job action.

Petitioner argues in this Petition that the offer to monitor the work relationship between her and Scott Head was also a tangible job action. Logic and consistency dictate that this remedial alternative suggested by Respondent – like the transfer – was an offer, not an actual adverse change.

Petitioner's suspension and termination were recognized by the Eleventh Circuit as tangible actions, but not sex discrimination. The court correctly concluded that it was Petitioner, not Respondent, who actually decided and insisted that she would not continue to work for Scott Head which resulted in her termination.

The admitted facts are that at the conclusion of Respondent's investigation, Petitioner was advised that her charges had not been corroborated. The Petitioner insisted that she would not work under the supervision of her manager. Petitioner, not Respondent, rejected the status quo and insisted on a change – the termination of Mr. Head.

After Petitioner repeated that she would not continue to work under the supervision of her manager, she was presented the choice of transferring to another location, or continuing to work under the supervision of her manager in Huntsville, under the scrutiny of an industrial psychologist that Respondent had successfully used to monitor such situations previously. (App. B, pp. 35a-36a).

Summary judgment against Petitioner's claim of retaliatory discharge was affirmed by the Eleventh Circuit, because the discharge resulted from the Petitioner's unequivocal refusal to work under the supervision of the accused manager, and the Petitioner's subsequent rejection of options presented to her of transferring to another location, or continuing to work in the same location under the monitoring of a psychologist. (*See,* App. B, pp. 35a-36a; *see also*, App. C, pp. 68a-71a). Petitioner makes no showing that this finding is at variance with any decision of this Court or in conflict with the precedent set by other United States court of appeals.

Argument on Third "Question Presented"

The Petition's third argument, at pp. 11-15, under the heading "III. THE DECISION BELOW APPLIES TOO STRICT A STANDARD," challenges the Eleventh Circuit's application of the *Ellerth/ Faragher* defense.

Petitioner first argues that the burden of proving an affirmative defense is on the defendant, a point on which Petitioner and the Eleventh Circuit agree (*see*, App. B, p. 4a, "To prevail under the *Faragher-Ellerth* defense, an employer must show not only that it fulfilled its responsibility, but also that the employee failed to fulfill hers." (*See also,* App. B, p. 26a, "Because it is an affirmative defense, the employer bears the burden of establishing both of these elements.")

Petitioner then suggests that application of the *Ellerth/Faragher* defense is based on the "avoidable consequences" doctrine, another point which is not contradicted by the decision of the Eleventh Circuit. However, Petitioner's mistaken inference from that doctrine is that the *Ellerth/Faragher* defense is merely a form of that mitigation of damage defense, permitting apportionment of damages, and, therefore, always a jury question (*see,* Petition, pp. 13-14).

The Eleventh Circuit carefully and correctly analyzed the *Ellerth/Faragher* defense, and concluded that Respondent established both elements of the *Ellerth/Faragher* defense (*see,* App. B, pp. 26a-35a).

Petitioner did not dispute the first element, that Respondent "has a valid anti-discrimination policy prohibiting harassment, which was effectively communicated to all employees, nor does she dispute that there were reasonable reporting requirements and procedures of which she was fully aware." (*see,* App. B, p. 26a).

Regarding the second element of the defense, that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise,"[5] the Petition contests the Eleventh Circuit's holding that Petitioner unreasonably delayed her invocation of Respondent's internal procedures, and suggests that there is a material conflict among circuit courts of appeals on the length of time from which unreasonableness can be inferred.[6]

Petitioner in this regard again misconstrues the decision of the Eleventh Circuit. The Eleventh Circuit recognized that circumstances might excuse a delay of the length Petitioner delayed here, or longer. (*See*, App. B, p. 34a). However, rather than setting an arbitrary time limit, the Eleventh Circuit accepted Petitioner's allegations of harassment and rejected her excuses for delay. The allegedly inconsistent decisions of other circuits do not follow a different analytical process, and none have declared an arbitrary minimum time that must be allowed.

The Eleventh Circuit also independently analyzed the Petitioner's flat refusal to cooperate in

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[5] *Faragher*, 524 U.S. at 807, 118 S. Ct. at 2293; *Ellerth*, 524 U.S. at 765, 118 S. Ct. at 2270.

[6] The Introduction to the Petition argues that the Eleventh Circuit now has a rule of "mandatory summary judgment" (Petition, p. 1) and that "summary judgment for failure to timely report sexually harassing behavior transforms the second prong of the Ellerth/Faragher affirmative defense to a statute of limitations . . . " (Petition, p. 2).

reasonable remedial measures proposed by Respondent after the investigation of her complaint, and found them an unreasonable failure to take advantage of corrective opportunities (App. B, p. 36a). The Petitioner contends that the remedial options offered after she refused to work with Scott Head were tangible job actions (*see,* Petition, pp. 10-11), but there is no dispute that Petitioner rejected each proposed remedy several times, and that she refused to continue to work for Scott Head. As the Eleventh Circuit noted, "that by itself is enough to carry the day . . . on the second element of the *Faragher-Ellerth* defense." (App. B, p. 32a).

Because the decision of the Eleventh Circuit concerning the *Ellerth/Faragher* defense is soundly based on the undisputed proof of the first element, and the equally undisputed proof that Petitioner failed to cooperate in reasonable corrective measures, Respondent is entitled to summary judgment regardless of whether the Petitioner's internal complaint was considered timely.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

PEYTON LACY, JR., ESQ.
Counsel of Record
JOHN RICHARD CARRIGAN, ESQ.
OGLETREE, DEAKINS, NASH,
SMOAK, AND STEWART, P.C.
1819 Fifth Avenue North,
Ste. 1000
Birmingham, AL 35203
Ph. (205) 328-1900;
Fax (205) 328-6000

Counsel for Respondent,
Blue Cross/Blue Shield of Alabama